

**Board of Vocational Nursing and Psychiatric Technicians  
Department of Consumer Affairs**

**FINAL STATEMENT OF REASONS**

**HEARING DATE:** May 11, 2011

**SUBJECT MATTER OF PROPOSED REGULATIONS:** Enforcement

**SECTIONS AFFECTED:** Amend Title 16, Division 25, of the California Code of Regulations as follows:

Vocational Nursing (VN): Amend sections 2503, 2524.5  
Add sections 2509, 2518.8, 2524.1  
Re-number section 2524.1 to section 2524.5

Psychiatric Technician (PT): Amend sections 2563, 2579.20  
Add sections 2568, 2576.8, 2579.11  
Re-number section 2579.11 to section 2579.20

**UPDATED INFORMATION:**

The Initial Statement of Reasons is included in the file. The information contained therein, which is incorporated by reference, is updated as follows:

The Board of Vocational Nursing and Psychiatric Technicians (Board) received three (3) written comments on April 29, 2011, May 2, 2011 and May 9, 2011. Those comments and the Board's responses are detailed under "Objections or Recommendations/Responses".

On May 11, 2011, a public hearing was conducted at the Board for Professional Engineers & Land Surveyors' conference room, 2535 Capitol Oaks Drive (Third Floor), Sacramento, California. The Board received one testimony during the public hearing.

As a result of comments received during the public comment period, the originally noticed text to add regulation sections 2509 and 2568 were modified by changing the wording "whenever it appears" to "whenever evidence exists" to clarify the Board's intent to be objective in its applicant review processes. Additionally, the text to add sections 2518.8 and 2576.8 was modified by deleting the wording "pending against the licensee" from subsection (c) to clarify the Board's requirement for the licensee to cooperate with *any* Board investigation.

A notice of the availability of modified text was posted on the Board's Web site and mailed on September 6, 2011. The public comment period began on September 6, 2011 and ended September 21, 2011. The Board received an oral comment on September 9, 2011 at its regularly scheduled Board meeting.

**LOCAL MANDATE**

A mandate is not imposed on local agencies or school districts.

**SMALL BUSINESS IMPACT**

The regulations will not have a significant adverse economic impact on small businesses. The regulations only impact licensed vocational nurses, psychiatric technicians, and applicants for licensure.

## **CONSIDERATION OF ALTERNATIVES**

No reasonable alternative to the regulations would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulations.

Set forth below are the alternatives which were considered:

1. Not adopt the regulations. This alternative was rejected because the regulatory proposal is based on internal and external reviews of the enforcement process and is necessary to improve the Board's enforcement operations.
2. Adopt regulations. The Board determined that this alternative is the most feasible because the regulatory proposal will enhance consumer protection by reducing the time it takes for the Board to take disciplinary action.

## **OBJECTIONS OR RECOMMENDATIONS/RESPONSES**

RESPONSE TO ORAL COMMENT RECEIVED AT THE MAY 11, 2011 HEARING:

Summary Oral Comment #1: Ken Murch, California Association of Psychiatric Technicians (CAPT).

Mr. Murch's oral comment was substantially the same as that received in letter written by Tony Myers, CAPT State President, dated April 29, 2011.

Response #1: Provided under summary of written comments.

RESPONSES TO WRITTEN COMMENTS TO SPECIFIC LANGUAGE INITIALLY NOTICED ON APRIL 6, 2011: (Copies of written comments are located in tab VIII and correspond to the numerical sequence indicated in each summary written comment.)

Summary Written Comment #1:

Submitted by:

1. Tony Myers, CAPT State President
2. Barbara Dickey, Disability Rights California (DRC)

The proposed text for sections 2509 and 2568 raised concerns with regard to the standard under which an applicant may be required to submit to a mental evaluation or physical examination. Ms. Dickey supports the concept of the proposed regulations, but not as written.

Response #1: The Board accepts this comment and modified the proposed text accordingly. This modification of the proposed text was made available on September 6, 2011. No written comment was received in response to the 15-day notice of modified text.

### Summary Written Comment #2:

Submitted by:

1. Tony Myers, CAPT State President

The proposed text for sections 2568 and 2509 raised a number of questions relative to the Board's requirement that an applicant submit to a mental evaluation and/or physical examination under certain conditions. Mr. Myers states concerns ranging from how physicians and/or psychologists making an assessment of the applicant will be determined and whether they will have a clear understanding of the duties of the profession, to how will any such findings determine the applicant's inability to perform the duties of the profession. Additionally, if the applicant is dissatisfied with the resulting professional assessment, what is the appeal process?

Response #2: The Board rejects this comment. The proposed regulations clearly indicate that the Board will establish which physicians, surgeons or psychologists the applicant must be examined by. As with all experts that are engaged to provide a professional opinion to the Board the expert will be required to have an understanding of the duties required of a licensee and as such he/she will provide a professional opinion supporting any conclusions drawn relative to an applicant's ability to practice safely.

Further, the proposed regulations state that if the resulting report determines the applicant is unable to safely practice, the Board may deny the application. If the application is denied, the applicant has a right to appeal such denial.

### Summary Written Comment #3

Submitted by:

1. Tony Myers, CAPT State President

The proposed text for sections 2576.8 and 2518.8 adds additional grounds for unprofessional conduct for licensees. Mr. Myers posed several questions seeking clarification and/or definitions of specific terminology, such as: "What is a civil settlement agreement?", "What is meant by lawfully requested documents under the licensee's control?", "What are the standards for determining whether a licensee has failed to cooperate and participate in a BVNPT investigation?" and lastly, "Who determines whether the failure [to cooperate] does or does not infringe upon the licensee's constitutional or statutory privileges?" In addition, Mr. Myers believes the current statutes and regulations for unprofessional conduct sufficiently include these issues proposed.

Response #3: The Board rejects this comment. The proposed regulations are intended to identify areas that may intentionally prevent the Board from investigating possible licensee misconduct and therefore, potentially placing the public at risk. The Board uses the dictionary definition of a civil settlement agreement. In [West's Encyclopedia of American Law](#), the term is defined as, "In civil lawsuits, it is the act of adjusting or determining the dealings or disputes between persons without pursuing the matter through a trial." The Board notes that criminal, civil and administrative proceedings each serve different functions.

Frequently, the Board encounters difficulty in obtaining legally requested documents or records from licensees during an investigation. If the licensee has control over such documents and

fails to provide them to the Board in a timely manner, the proposed regulation would deem such an action as unprofessional conduct. The proposed regulation does not infer that the licensee would have control over documents maintained by law enforcement, the courts, or health care employers.

As with failure to produce documents, the failure to participate or cooperate in an investigation impedes and delays the investigative process and erodes the Board's public protection mandate. The proposed regulation's intent is to not deprive a licensee of any constitutional or statutory privilege. Exercising any constitutional or statutory privilege by a licensee shall not be used against the licensee in a regulatory or disciplinary proceeding.

The Board's present regulatory authority does not encompass the proposed regulatory issues concerning licensee unprofessional conduct. Adopting the proposed regulatory text will enhance the Board's ability to protect the public.

#### Summary Written Comment #4:

Submitted by:

1. Tony Myers, CAPT State President

Mr. Myers contends it is "debatable" that the fiscal impact of enacting these regulations will be minor as indicated in *The Notice of Proposed Changes* (Notice), a document accompanying the originally proposed regulation text.

Response #4: The Board rejects this comment. The fiscal impact portion of the Notice cited by Mr. Myers is intended to reasonably estimate costs or savings to the State if the proposed regulations are enacted. The proposed regulations indicate the Board will incur the costs associated with requiring applicant's to submit to a physical examination or mental evaluation. As such, based on the Board's estimates this cost will be minor and can be absorbed.

#### Summary Written Comment #5:

Submitted by:

3. Elliot Hochberg

Mr. Hochberg's comments related to proposed changes to sections 2503 and 2563 suggest clarification is needed, as part of the proposed regulations, relative to the Board members' role in settlement cases. In addition, he suggests that using the words "interim suspension" may be confused with the statutory guidelines established in B&PC section 494.

Response #5: The Board rejects this comment. The purpose of the proposed modification to regulation sections 2503 and 2563 is to establish specific authority delegated from the Board to the executive officer (EO). The proposed regulation text identifies the limited types of *settlement agreements* the EO will have delegated authority to approve and, therefore, should not be confused with the remaining or otherwise existing authority of the Board.

#### Summary Written Comment #6:

Submitted by:

3. Elliot Hochberg

Mr. Hochberg recommends the Board expand the regulatory authority in sections 2509 and 2568 to include the denial of an application for licensure should the applicant fail to complete a mandated mental or physical examination as a condition for licensure. Further, Mr. Hochberg states his concern that the public would not be made aware of an applicant's failure to complete such an exam.

Response #6: The Board rejects this comment. The proposed regulations provide that the application would stand incomplete if the applicant fails to comply with a mental or physical examination mandated by the Board. An application will not be approved unless *all* requirements are met. Secondly, the Board's ability to release information to the public must be in compliance with not only other laws such as the Public Records Act (Gov. Code § 6252 et. seq.) and the Information Practices Act (Civil Code § 1798 et. seq.), but also its own Consumer Complaint Disclosure regulations (CA Code of Regulations § 2524.1 [VN] and § 2579.11 [PT]). The Board's regulatory guidelines only permit disclosure if the matter is substantiated through investigation and/or an Accusation or Statement of Issues is filed. Considering all interests, the Board believes the current proposal best balances the privacy and protection of California consumers.

#### Summary Written Comment #7:

Submitted by:

3. Elliot Hochberg

Mr. Hochberg recommended the Board revise additional text within sections 2503 and 2563 changing the words "in the absence of the Executive Office from the office of the board" to "when available" or other words that convey the circumstances when the EO is incapable of acting.

Response #7: The Board rejects this comment. The Board does not agree that changing the wording of the text, as suggested, is necessary nor is it the subject matter of the proposed regulations.

#### Summary Written Comment #8:

Submitted by:

3. Elliot Hochberg

Mr. Hochberg's comments relative to the proposed regulatory text in sections 2524.1 and 2579.11 are supportive of the proposed regulations and he recommends that additional proposed regulations with absolute bars for greater preemptive and preventative public protection be introduced.

Response #8: The Board rejects this comment for the purposes of modifying the proposed text. The intent of the proposed regulations is to deny or revoke a license if an individual is required to register as a sex offender. The Board is not seeking to address additional areas at this time.

Summary Written Comment #9:

Submitted by:

3. Elliot Hochberg

Mr. Hochberg comments on the fact that the proposed regulatory text for sections 2509 and 2568 does not include the process the board will use to require an examination for applicants and recommends that the proposed regulations need to clarify the process to be used to require applicants to take an examination.

Response #9: The Board rejects this comment. The intent of the proposed regulations is not to provide the Board's procedural details required to achieve the intended results, but rather to establish the Board's authority to require that an applicant undergo a mental or physical examination when it appears the individual may not be able to practice safely. The request for exam will be handled on a case by case basis – the same way other requests to the applicant for clarification about qualifications are handled.

RESPONSE TO ORAL COMMENT REGARDING MODIFIED LANGUAGE, RECEIVED AT SEPTEMBER 9, 2011 REGULAR BOARD MEETING:

Summary Oral Comment #2: Tony Myers, CAPT State President.

Mr. Myer's expressed his desire to indicate that the written comments he submitted in his April 29, 2011 letter still stands. He expressed additional concerns about the imposed 30-day response time for licensees to report arrests on disciplinary actions by employers and the Board's [in]ability to enforce such a timeframe.

Response #2: The Board rejects this comment. The comments are outside of the scope of the modified text and not related to the recent modifications made to the proposed language.

**The Board received no written comments regarding the modified text during the 15-day comment period.**

(10/21/11)